Petition

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No.

IN THE

Supreme Court of the United States

October Term, 1981

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January, 1982

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QUESTIONS PRESENTED

Whether the Court of Appeals, in reviewing an I.C.C. railroad abandonment decision, properly should deny an interlocutory injunction where the railroad assures that the roadbed and track will be preserved pending judicial review, yet service will be discontinued during such review.*

*Petitioners in the court of appeals are People of the State of Illinois, Illinois Commerce Commission, City of Vandalia, New Green Soil Service, Inc., Harbach, Nixon and Willson, Inc., Patrick W. Simmons, and Bi-Petro Refining Company, Inc. Respondents are Interstate Commerce Commission and United States of America. Intervening respondent is Illinois Central Gulf Railroad Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois, Illinois Commerce Commission, City of Vandalia, New Green Soil Service, Inc., Harbach, Nixon and Willson, Inc., Patrick W. Simmons, and Bi-Petro Refining Company, Inc., pray that a writ of certiorari issue to review the order of the U.S. Court of Appeals for the Seventh Circuit, denying an interlocutory injunction, entered November 27, 1981 in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-2a) is unreported. The opinion of the Interstate Commerce Commission (App. C, 6a-18a) is unreported. The opinion

of the Interstate Commerce Commission denying a stay pending judicial review (App. E, 21a-23a) is unreported.

JURISDICTION

The order of the Court of Appeals denying an interlocutory injunction (App. A, 1a-2a) was entered November 27, 1981.

The jurisdiction of the Supreme Court is confered by 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

The statutes primarily involved are 49 28 U.S.C. 10903(a), 28 U.S.C. 2349(b), and 5 U.S.C. 705.

49 U.S.C. 10903(a):

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may-
>
> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

28 U.S.C. 2349(b):

The filing of the petitition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending hearing on the application for an interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, an identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest

practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review an order under this chapter, the same requirements as to precedence and expedition apply.

5 U.S.C. 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

STATEMENT

The proceeding below in the Court of Appeals embraces two petitions to review the decision of the Interstate Commerce Commission (I.C.C.) which approved the abandonment by Illinois Central Gulf Railroad Company (ICG) of its 66-mile line of railroad between Assumption and Branch Junction, Illinois. The petitions were filed in September, 1981, pursuant to 28 U.S.C. 2342(5).[1]

[1]One petition was filed jointly by People of the State of Illinois, Illinois Commerce Commission, City of Vandalia, and two shippers located at Pana, Illinois; the other petition was filed by Bi-Petro Refining Company, Inc., a shipper at Pana, Illinois.

The I.C.C. decision was issued July 30, 1981 by two I.C.C. employees. (App. C, 18a). Administrative appeals were taken from the employee decision but, relying upon the recently-enacted Staggers Rail Act of 1980,[2] the I.C.C. declined to hear the appeals by decision served August 28, 1981. (App. D, 19a-20a). Accordingly, a certificate authorizing the abandonment was issued to become effective September 30, 1981.

Petitioners first sought a stay of the abandonment from the I.C.C., which was denied. (App. E, 21a-23a). The Court of Appeals on October 29, 1981 denied a stay, on ICG's representation it will preserve the roadbed and track pending judicial review. (App. B, 4a):

> IT IS ORDERED that the emergency application for stay is hereby DENIED on counsel for Illinois Gulf Central's representation that Illinois Gulf Central will preserve the roadbed and track in place while their appeals are pending in this court.

The Court of Appeals on November 27, 1981 denied an application for an interlocutory injunction, again on the representations the roadbed and track would be preserved. (App. A, 2a):

> IT IS ORDERED that the "APPLICATION FOR AN INTERLOCUTORY INJUNCTION" is hereby DENIED. Counsel for the Illinois Central Gulf Railroad Company has assured the court that it will preserve the roadbed and track while these appeals are pending.

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[2] P.L. 96-448, section 402(b)(3). 94 Stat. 1941-42. 49 U.S.C. 1904(c)(3).

Application for stay was on December 1, 1981 denied by Mr. Justice Stevens.[3] The abandonment became effective November 29, 1981.[4]

REASONS FOR GRANTING THE WRIT

The Court of Appeals had decided questions of federal law which are important and recurring, warranting review by the Supreme Court of the United States.

Various railroads have filed numerous applications with the I.C.C. for the abandonment of major lines. The instant Assumption to Branch Junction line of ICG is part of the carrier's so-called "Charter Line" in Illinois.[5]

During the 29-month period August 1, 1979-December 31, 1981, the I.C.C. granted 379 railroad abandonment applications, covering 10,089 miles of line. The agency denied 2 minor applications covering 24 miles. This approval rate is very much greater than the historical pattern indicating that between 5 and 10 percent of abandonment applications usually are denied. See: Cherington, Charles, R., *Regulation of Railroad Abandonments,* 100-101 (Harvard 1948); Conant, Michael, *Railroad Mergers and Abandonments,* 114 (Univ. of Calif., 1964).

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[3]No. A-464 (Oct. Term. 1981).

[4]Supplement 53 to Leland's ICC OPSL 6000-B.

[5]For citations to the history surrounding the "Charter Line", see: *Snow* v. *Dixon,* 66 Ill. 2d 443, 362 N.E. 2d 1052 (1977). For a map, see: *State* v. *Illinois Cent. R. Co.,* 246 Ill. 188, 92 N.E. 814 (1910).

During the period February, 1976 through July, 1979,[6] the I.C.C. decided 441 abandonment cases, in which it denied 41 of the 441 requested abandonments.

Stays Pending Judicial Review

About 4 percent of the I.C.C.'s abandonment decisions become the subject of judicial review. The I.C.C.'s policy until January, 1980 was to itself stay the abandonment pending judicial review. This policy was recognized by the courts of appeals, including that for the Seventh Circuit in a 1979 decision. *People of State of Ill. v. United States,* 604 F.2d 519, 529 n.25 (7th Cir. 1979):

> ". . . in view of the fact that the Commission regularly grants stays for administrative or judicial review."

Since January, 1980, virtually every request for stay of an abandonment decision has been denied by the I.C.C.;[7] and beginning in the fall of 1980, the various courts of appeals began to uphold the I.C.C.'s denial of a stay pending judicial review, usually (but not always) on condition that the roadbed and track not be removed pending judicial review.

This denial of a stay by the courts of appeals occurred in the following recent petitions for review of I.C.C. abandonment decisions:

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[6]Railroad Revitalization and Regulatory Reform Act of 1976 was enacted February 5, 1976. The legislation revised procedure for line abandonment applications. P.L. 94-210, section 802, 809(c), 90 Stat. 127-130, 146.

[7]The only known exception was the I.C.C.'s stay action where the abandonment was reviewed in *International Minerals & Chemical Corp.* v. *I.C.C.*, 656 F.2d 251 (7th Cir. 1981).

1.No. 80-3723 (5th Cir.), *Mississippi Public Service Commission* v. *I.C.C.* (AB-43, Sub-55)

2.No. 80-3939 (5th Cir.), *Mississippi Public Service Commission* v. *I.C.C.* (AB-43, Sub-54)

3.No. 81-1464 (D.C. Cir.), *Crossroad Distributors* v. *United States* (AB-6, Sub-69)

4.No. 81-1760 (7th Cir.), *People of State of Illinois* v. *I.C.C.* (AB-43, Sub-63)

5.No. 81-4291 (5th Cir.), *Fayette Enterprises* v. *I.C.C.* (AB-43, Sub-63)

6.No. 81-2333 (8th Cir.), *Brownsdale Cooperative Assn.* v. *I.C.C.* (AB-1, Sub-113)

7.No. 81-4407 (5th Cir.), *Mississippi Public Service Commission* v. *I.C.C.* (AB-43, Sub-71)

8.No. 81-3667 (6th Cir.), *Tennessee Public Service Commission* v. *I.C.C.* (AB-2, Sub-29)

9.No. 81-2520 (7th Cir.), *People of State of Illinois* v. *I.C.C.* AB-43, Sub-66).

I. THE DECISION TO PERMIT AN ABANDONMENT TO BECOME EFFECTIVE SERVES TO DENY EFFECTIVE JUDICIAL REVIEW.

The Court of Appeals has permitted the abandonment to become effective pending review of the validity of the agency determination, subject only to the preservation of roadbed and track structure. The discontinuance of all service over a line of railroad constitutes an "abandonment" even though the roadbed and tracks may not be immediately removed. ICG has cancelled its tariffs applicable to the Assumption/Branch Junction line and has no intention of resuming service unless ordered to do so.

An abandonment "is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *I.C.C.* v. *Chicago & N.W. Transp. Co.*, 533 F. 2d 1025, 1028 (8th Cir. 1976); *Chicago & N.W. Co.* v. Kalo Brick & Tile Co., 450 U.S. 311 (1981).[8]

The heretofore long-maintained policy of the I.C.C. to grant a stay in judicial review of abandonment cases was consistent with preservation of the right of effective judicial review.[9] The agency has recognized that abandonment is normally an irreversible action. *Southern Pacific Transp. Co. Abandonment*, 354 I.C.C. 752, 756 (1978):

> We are acutely aware that abandonment of a line is normally an irreversible action.

The pledge to preserve the roadbed and tracks pending judicial review does not preserve the status quo. Indeed, Congress has recognized that abandonment of service should be subject to immediate injunctive action because of the adverse effect upon shippers and communities. *I.C.C.* v. *Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974); *I.C.C.* v. *Chicago, Rock Island and Pacific Railroad Co.*, 501 F.2d 908, 912-15 (8th Cir. 1974).

As a practical matter, the denial of a stay by a court of appeals in an abandonment case means that the petition

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[8]For a compendium of citations, see: *I.C.C.* v. *Baltimore and Annapolis Railroad Company*, 398 F. Supp. 454, 462-63 (D. Md. 1975), aff'd 537 F.2d 77 (4th Cir. 1976), cert. den. 429 U.S. 859.

[9]There have been exceptions where the I.C.C. did not grant a stay, but such are believed to be few in number. See: *Tennessee Public Service Commission* v. *United States*, 275 F. Supp. 87 (W.D. Tenn. 1967); *Whitehead Brothers Company* v. *United States*, 247 F. Supp. 614 (D. Mass. 1965).

for review will likely not be progressed to conclusion. This has been the actual result where stays have been denied. We are aware of only the instant proceeding, and one pending in the Fifth Circuit,[10] that have gone to briefing after a stay was denied. The other cases have been voluntarily dismissed. Moreover, even if petitioners are successful in having a reviewing court remand an abandonment application to the I.C.C. with the line out of service, the virtual 100 percent approval of all abandonments by the agency makes such action futile. The line must be in service for petitioners to possess the will to continue with judicial review.

Further, petitioners would not be entitled to civil damages if they ultimately prevail in setting aside the railroad's exercise of the abandonment certificate. Injunctive relief is the sole remedy. *Powell* v. *United States,* 300 U.S. 276, 287-88 (1937); *Chicago & N.W. Tr. Co.,* v. *Kalo, Brick & Tile Co., supra,* at 323 n.10. Finally, even the carrier's efforts to preserve the roadbed and track may not prevent the reverter of land. See: *Matter of Chicago, M. St. P. & P. R. Co.,* 654 F.2d 1218 (7th Cir. 1981).

The action of the I.C.C. and the Court of Appeals in permitting the abandonment to become effective pending judicial review is contrary to the statutory scheme that in the course of orderly procedure there may be judicial review of I.C.C. orders. *Florida East Coast Ry.* v. *United States,* 228 F. Supp. 340 (M.D. Fla. 1964); *City of Williamsport* v. *United States,* 273 F. Supp. 899, 904 (M.D. Pa. 1967).

One of the grounds given by this Court in reversing the denial of an interlocutory injunction against consumma-

[10]No. 81-4291, *Fayette Enterprises* v. *I.C.C.*

tion of the Penn-Central merger pending judicial review was that abandonments were contemplated. *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 391 (1967):

> "This is blinking at reality. The fact is that traffic, trackage, terminals, etc., as well as financial and corporate structures can and will, beyond doubt, be quickly combined, changed, abandoned, or consolidated."

Here also, the abandonment of the line pending judicial review serves to terminate judicial review as a practical matter.

II. PROPER FINDINGS SHOULD BE MADE IN DECIDING APPLICATIONS FOR INTERLOCUTORY INJUNCTION.

The Court made no findings in its order denying an interlocutory injunction, other than the carrier would preserve the roadbed and track pending judicial review. (App. A, 2a).

But the preservation of the roadbed and track structure should not, *per se,* result in the denial of an interlocutory injunction. Findings are ordinarily required by a reviewing court in the grant or denial of an interlocutory injunction. *Mayo* v. *Canning Co.,* 309 U.S. U.S. 310, 316 (1939); *Sampson* v. *Murray,* 415 U.S. 61 (1974); F.R. Civ. P. 52.

The provisions of 28 U.S.C. 2349(b) contemplate findings in the disposition of an application for an intelocutory injunction against the effectiveness of an agency order.

The Court of Appeals erred in ruling the preservation of the roadbed and track structure was dispositive of petitioners' application for stay and application for in-

terlocutory injunction. The Court of Appeals should have made findings on the traditional criteria governing such applications to postpone the effective date of agency action. Cf. *Virginia Petroleum Jobbers Assn.* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area, Etc.* v. *Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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January, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 27, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

No. 81-2520
PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervenor-Respondent.

Petition for Review of an Order of the Interstate Commerce Commission.

No. 81-2540
BI-PETRO REFINING COMPANY, INC.,
Petitioner,
vs.
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervenor-Respondent.

This matter Comes before the court for its consideration upon the following documents:

1) "APPLICATION FOR AN INTERLOCUTORY INJUNCTION" filed herein on November 16, 1981 by counsel for the petitioners.

2) "RESPONSE OF INTERVENOR-RESPONDENT TO APPLICATION FOR AN INTERLOCUTORY INJUNCTION" filed herein on November 23, 1981.

3) "RESPONSE OF THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITIONERS' APPLICATION FOR INTERLOCUTORY INJUNCTION" filed herein on November 23, 1981.

On consideration thereof,

IT IS ORDERED that the "APPLICATION FOR AN INTERLOCUTORY INJUNCTION" is hereby DENIED. Counsel for the Illinois Central Gulf Railroad Company has assured the court that it will preserve the roadbed and track while these appeals are pending.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

BI-PETRO REFINING COMPANY, INC., PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

No. 81-2520 & 81-2540
vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervenor-Respondent.

Petition for Review of an Order of the Interstate Commerce Commission

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This matter comes before the court for its consideration upon the following documents:

1. The "EMERGENCY APPLICATION FOR STAY" filed herein on September 29, 1981 by counsel for the petitioners.

2. The "RESPONSE OF THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITIONERS' EMERGENCY APPLICATION FOR STAY"

filed herein on October 6, 1981 by counsel for the respondents.

3. The "MOTION FOR AN EXTENSION OF TIME" filed herein on October 6, 1981 by counsel for the intervenor-respondent.

4. The "RESPONSE OF INTERVENOR-RESPONDENT TO EMERGENCY APPLICATION FOR STAY" filed herein on October 8, 1981 by counsel for the intervenor-respondent.

5. The "RESPONSE TO I.C.C. DECISION SERVED FRIDAY, OCTOBER 2, 1981" filed herein on October 6, 1981 by counsel for the petitioners.

6. The "MOTION TO STRIKE" filed herein on October 8, 1981 by counsel for the intervenor-respondent.

7. The "SUPPLEMENT TO 'EMERGENCY APPLICATION FOR STAY'" filed herein on October 16, 1981 by counsel for the petitioners.

8. The "SUPPLEMENTAL MEMORANDUM CONCERNING AGENCY RECORD" filed herein on October 23, 1981 by counsel for the petitioners.

On consideration thereof,

IT IS ORDERED that the emergency application for stay is hereby DENIED on counsel for Illinois Gulf Central's representation that Illinois Gulf Central will preserve the road bed and track in place while their appeals are pending in this court.

IT IS FURTHER ORDERED that the motion to strike is DENIED since the "Supplement to Emergency Application for Stay" was never before this court. It was sent by Federal Express to the Circuit Court of Cook County.

Some days later it was forwarded to the United States District Court and then to the United States Court of Appeals. When it arrived in this Court only one copy was tendered. An original and three copies is required for filing in this Court.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE
Jul. 30 1981

No. AB-43 (Sub-No. 66F)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 661.87 AND 720.00 NEAR BRANCH JUNCTION AND ASSUMPTION IN CHRISTIAN, FAYETTE, MARION, AND SHELBY COUNTIES, IL

Decided: July 21, 1981

Illinois Central Gulf Railroad Company (ICG) filed an application to abandon 76 miles of rail line[1] between Branch Junction and Assumption, IL.[2] Numerous parties, including state and local governments, labor groups and shippers filed pleadings opposing the abandonment.[3] For

[1]The 76 miles consists of 66.13 miles of branch line and 9.87 miles of side track.

[2]After the abandonment, both Branch Junction and Assumption will retain service, the former from a different ICG Line and the latter because it is located north of the limits of the abandonment. All points named in this decision are in Illinois.

[3]Verified statements were filed by the following parties: State of Illinois and Illinois Commerce Commission (Illinois); Villages of Oconee, Patoka, Ramsey, Sandoval and Vernon; City of Vandalia; the General Chairman and the Illinois Legislative Director for the United Transportation Union (UTU); Bi-Petro Refining Company, Inc. (Bi-Petro); Growmark, Inc. (representing its two member companies, Christian County Farmers Supply Company and Fayette Service Company) (collectively, Growmark); P.N. Hirsch & Co. Stores, Inc. (Hirsch); Imco Container Company (IMCO); and New Green Soil Service, Inc. (New Green) and Harbach, Nixon & Willson Inc. (Harbach), jointly.

In addition, statements were filed by Jenkins Truck & Farm Service, Oconee Grain Company; Patoka Farmers' Cooperative Assn. Inc.;

the reasons discussed below we will grant the abandonment.

PROCEDURAL MATTERS

UTU and Illinois filed a joint petition asking us to require ICG to furnish 1978 and 1979 bridge or overhead traffic data for this line. ICG moved to strike this petition. We will consider and deny the petition.

In an order served August 5, 1980, and affirmed October 31, 1981, the Commission granted ICG a waiver of the requirements of supplying information on the bridge traffic. The Commission concluded that this information was not required since ICG had shown that it had rerouted and retained the bridge traffic since April 1979, due to the failure of a bridge between Ramsey and Pana, and was carrying the traffic more efficiently over the other routes. The Commission indicated that UTU could seek discovery of these data upon a showing of good cause. We see nothing in UTU's petition, however, that causes us to

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and First State Bank of Patoka. ICG moves to strike these last four statements as well as those of the municipalities because none of these parties had previously filed any material in this case. Because ICG received these statements and consideration of them will not burden the record, the motion will be denied.

For these same reasons, we will also consider the unverified statements filed by Brotherhood of Locomotive Engineers (BLE), Railway Employees' Department (RED), and Railway Labor Executives' Association (RLEA).

Finally, Ralston Purina Company (Ralston Purina) filed a verified statement. Apparently this statement was not sent to ICG. Despite that, we will consider this statement because to do so will not unduly burden the record or delay the proceeding. In addition, our consideration of this statement will not prejudice ICG because it contains no evidence or argument not raised by the other parties or previously submitted in this shipper's initial protest, which was served on ICG's representative.

reconsider the earlier findings. Because this bridge traffic has already been rerouted and retained for 2 years, we believe that the data are not relevant in determining the burden to be borne by ICG in continuing operation over the line. UTU's petition is denied.

UTU and Illinois also filed a joint motion to strike ICG's rebuttal statement because it is unverified and allegedly a mixture of fact and argument in violation of 49 CFR 1100.47-48 and contains errors and misrepresentations. Since protestants' objections go more to the weight to be accorded the challenged material rather than to its admissibility, we will consider the statement as argument. In addition, we note that the material found most objectionable was not relied upon by us in reaching our conclusions.

BURDEN ON ICG

ICG seeks to abandon this line because it has been losing money operating the line. Moreover, abandonment will allow ICG to avoid spending large sums of money to rehabilitate and maintain the line.

The line's avoidable losses in 1978 and 1979 were $329,928 and $239,676, respectively. Although the avoidable losses were less in the base year (October 1, 1979, through September 30, 1980), they were still significant – $47,635.[4] For the first 9 months of 1980, the line

[4]IMCO contends that the line shows a $292,069 profit for the base year based on avoidable costs of $375,2523 rather than $714,956 as calculated by ICG. ICG disputes IMCO's calculations of avoidable costs, stating that they fail to include off-branch costs properly allocable to the line. We agree with ICG and note further that IMCO's figures also fail to include $3,969 in taxes properly allocable to the line. We have, therefore, accepted ICG's calculations as correct.

was marginally profitable as operating revenues exceeded expenses by $1,340.

UTU claims that the line is profitable or has a *de minimus* loss if adjustments are made reflecting the non-avoidability of certain labor costs. Specifically, UTU believes that the wages of firemen and trainmen employed in the operation of the line are not avoidable because these employees can and will work on other runs. In AB-10 (Sub-No. 10), *Wabash Railroad Company and Norfolk and Western Railway Company Abandonment* (not printed), decided June 2, 1978, Division 2 stated:

> . . . [W]hether there is a job reduction as opposed to a job reassignment is ordinarily irrelevant in an abandonment proceeding, because applicants generally have an ongoing hiring program to maintain their required employment levels, and reassignment of their present employees will proportionately reduce future hiring of new employees.

We agree. Since ICG's avoidable cost calculations appear to be in accordance with Commission regulations, and are not otherwise challenged by protestants, they will be accepted. We note, however, that even if the line were marginally profitable, abandonment would be justified for the reasons discussed below.

The decrease in operating losses attributable to the line since 1978 is due partly to ICG's deferral of maintenance. In 1978, ICG spent $199,389 on maintenance of the line. That amount decreased to $148,682 in 1979, $81,488 in the base year and $56,593 in the first 9 months of 1980. As a result, the line now needs extensive rehabilitation. ICG has estimated that it would cost $897,040 to bring the line into compliance with Federal Railway Administration Class I

minimum safety standards. In addition, ICG claims that annual maintenance after rehabilitation would cost $318,853.

The burden on ICG of continued operations is further magnified when we consider the "lost opportunity" costs it would continue to incur in having valuable assets tied up in this nonproductive use. According to ICG, the value of the real estate freed for other use after abandonment plus the net salvage value of the rail materials equals $4,922,015. In arriving at this figure ICG made two minor adjustments (amounting to $23,127) which we will disallow.[5] Thus, the actual net liquidation value of ICG's properties invested in this line is $4,898,888. Applying the 9.3 percent rate of return accepted by the commission for ICG,[6] we conclude that ICG would have to earn $455,597 in order to avoid incurring an opportunity cost.

The witness for Illinois, Assistant Attorney General Mary C. Ubatuba, disputes ICG's conclusion that it could earn approximately $2,600,000 from the sale of the right-of-way. (Ms. Ubatuba does not dispute ICG's ability to sell the non-right-of-way property for $824,650.) Ms. Ubatuba believes that the right-of-way is part of the "charter line" acquired by ICG's predecessor for operation as a line of railroad and that the property cannot be transferred without approval of the Illinois legislature. Although ICG disagrees with this claim, we need not resolve this issue. Even with this property totally excluded, from the calculations, ICG would still have a significant

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[5]ICG added $7,543 in rounding up the real estate valuation and $15,584 for working capital, which the Commission has previously determined should not be included in calculating opportunity costs.

[6]*Illinois Central Gulf R. Co. - Abandonment,* 363 I.C.C. 729 (1981).

opportunity cost of over $200,000. We do not believe that this line has the potential to earn $200,000 a year.

OPPOSITION TO ABANDONMENT

Although numerous parties filed statements opposing this abandonment, only seven affected shippers, Illinois and UTU, offered any specific evidence or argument to suport their position[7]

Four of the seven shippers (Growmark, Hirsch, IMCO, and Ralston Purina) indicate they would not oppose abandonment if operations over a 12-mile portion of the line at Vandalia were taken over by Consolidated Rail Corporation (Conrail). They request that abandonment over this 2-mile segment be denied or postponed until an agreement between ICG and Conrail is finalized.

ICG has been negotiating with Conrail for the sale of the line, but has not yet reached a final agreement. In its rebuttal statement filed April 1, 1981, ICG repeated its commitment to make this line segment available to Conrail or any other interested person. However, ICG opposes imposition of a condition requiring the sale or postponement of the abandonment.

We can find no basis to deny or postpone abandonment until the negotiations are successfully concluded. ICG has introduced convincing evidence that the entire line has been and will continue to be unprofitable. Delaying the abandonment would only force ICG to incur additional losses, imposing a burden on interstate commerce. Moreover, since the Vandalia trackage is in the middle of

[7]The remaining parties merely state that the abandonment would impair the economic growth of their communities or increase their costs of doing business.

the line to be abandoned and not connected to any other ICG Line, it would be operationally unreasonable to require ICG to continue these operations.

While Conrail's take-over of these operations might be a desirable course of action, we have no authority to require Conrail to purchase this line. We do not consider it appropriate to condition approval of the abandonment on ICG's reaching an agreement with Conrail. We prefer to see the private sector negotiate these agreements without our direct intervention. If such negotiations prove unsuccessful, any financially responsible person may seek to purchase the segment or subsidize ICG's operations over the segment under the offer of financial assistance procedures set forth at 49 U.S.C. 10905, as amended by the Staggers Rail Act of 1980 (Pub. L. No. 94-448).

Bi-Petro uses this line to transport goods from and to its refinery at Pana. It suggests that rehabilitation would not be needed on the segment from Assumption to Pana and that ICG should be forced to continue operations over that segment. It blames the line's poor condition and lack of business growth on ICG's poor maintenance and operating habits.

We believe that it is a legitimate business practice for a carrier to defer maintenance on a losing line. *Norfolk & W. Ry. Co. Abandonment,* 363 I.C.C. 115 (1980). There has been no allegation that ICG deliberately downgraded its line in anticipation of abandonment. Instead, ICG cut back on its expenditures in order to halt its massive losses. If it had not done so, the record undoubtedly would indicate that the line would have continued to incur annual operating losses exceeding $100,000.

Bi-Petro also plans to develop a new refinery process involving transportation of materials which allegedly would

move most feasibly by rail and contends, therefore, that the abandonment would be detrimental to its future as well as its current operations. Bi-Petro does not indicate, however, when this new operations would commence or how much rail traffic would be generated.

Bi-Petro states that it does not presently have the information to assess the cost and availability of transportation alternatives and suggests that oral hearings be held so that it may present such evidence. Considering that the abandonment application was filed in September 1980, 6 months before Bi-Petro filed its evidentiary statement, we believe Bi-Petro has had sufficient opportunity to assess transportation alternatives and present evidence on this issue. ICG states that Bi-Petro has moved very little of its product by rail, the bulk being moved by motor carriers or pipelines, and that Bi-Petro's traffic accounts for a very small percentage of the total traffic on the Assumption-Pana segment. In addition, ICG claims that it discussed with Bi-Petro the possibility of having service at Pana continued by either Conrail or Missouri Pacific Railroad Company (Mo-Pac) whose lines cross the ICG tracks in Pana, but that Bi-Petro expressed no interest in these possibilities. ICG contends, therefore, that alternative transportation modes appear to be adequate and are currently fulfilling most of Bi-Petro's needs. We agree.

New Green and Harbach receive bulk shipments of fertilizer by rail at Pana. (They received about 100 carloads in both 1979 and 1980.) They oppose abandonment because of the additional costs and community safety hazards of using trucks. Protestants indicate that they have received citizen complaints about existing truck traffic in and out of the facilities; they fear that the additional truck traffic caused by loss of rail service would increase these complaints and may result in the imposition of load restric-

tions by the City of Pana to redirect all truck traffic around the City.

New Green and Harback do not indicate the extent of their truck traffic. However, since their own testimony describes only inbound shipments moving by rail, it appears, as argued by ICG, that all outbound shipments have been moving by truck. In light of these shippers' already apparently heavy use of truck service, we are not persuaded that they would be significantly adversely affected by having to use truck service for all their traffic. Protestants' fear that increased truck traffic will result in a total ban of all truck traffic in the City is too speculative to be accorded much weight.

As to the safety problem, despite community complaints, protestants have continued to used truck service. Moreover, the City of Pana which protestants claim will be adversely affected by this increased truck traffic did not file a statement in opposition to the abandonment. Under these circumstances, we are not convinced that abandonment will result in a safety hazard in Pana.

Several shippers state that loss of rail service would increase their operating costs, place them at a competitive disadvantage, and curtail future growth of their businesses. However, only three shippers indicate the extent of increased transportation costs they would incur. IMCO claims that using trucks from two origins, for example, would double its transportation costs. Growmark claims that trucking would increase the cost of fertilizer by about $10 a ton or approximately $40,000 annually. Ralston Purina estimates its costs would increase by about $100,000 annually, but offers no supporting data or explanation of how it arrived at this figure. Furthermore, none of these shippers (all located at Vandalia) has taken

into account what its increased transportation costs would be if it used a combination of rail and motor service (via Conrail's team track at Vandalia) to satisfy some or all of its transportation needs. Moreover, none has specified how much business loss it would suffer.

EMPLOYEE PROTECTION

The labor representatives argue that any abandonment approval should be subject to the provisions for employee protection set forth in *Oregon Short Line R. Co. Abandonment - Goshen,* 360 I.C.C. 91 (1979) (*Oregon III*) with certain modifications. The conditions imposed in *Oregon III* have been found to satisfy the statutory requirements of 49 U.S.C. 10903(b)(2) and are customarily imposed in an abandonment, unless modifications are shown to be needed because of the facts of a particular case. See *Oregon Short Line R. Co. - Abandonment - Goshen,* 360 I.C.C. 666 (1980). No facts have been presented here which warrant modification of the *Oregon III* conditions. We will, therefore, impose those conditions in their standard form.

CONCLUSION

The standard for determining whether to grant or deny a proposed abandonment is clearly set forth in *Colorado* v. *United States,* 271 U.S. 153, 168 (1926). In evaluating the merits of abandonment proposals, we are to balance the present and future needs for the rail line – and the harm to affected shippers and communities which would result from abandonment – against the present and future burden which continued operation would impose on applicant and on interstate commerce. Here, we find that the need for the line does not outweigh the burden

that continued operation would impose on applicant and on interstate commerce.

This line has been losing a great deal of money. Although barely profitable for the first 9 months of 1980, the line would have had substantial losses if normal maintenance had been performed in those months. Moreover, in order to bring the line up to minimal safety standards ICG would have to spend nearly $900,000 for rehabilitation. Finally, even if we accepted Illinois' argument about the property valuation, ICG would still have to earn over $200,000 annually to avoid incurring additional "lost opportunity" costs.

When these burdens are weighed against the potential harm to the shippers and communities, we conclude that the entire proposed abandonment (including the Branch Junction to Vandalia segment) must be approved. Alternative transportation is available and presently being used in the area.[8] While shippers will incur some financial losses and inconvenience from the abandonment, these are the unfortunate but not unusual consequences of most abandonments. These factors alone do not justify continued operation of, and further financial investment in, an unprofitable line. *Fort Dodge, Des Moines and Southern Ry. Co. Abandonment,* 312 I.C.C. 708 (1961). The lack of any specific opposition evidence by the local communities indicates that there will be no serious adverse impact on rural and community development.

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[8]Alternate rail service is available from Baltimore & Ohio Railroad Company at Sandoval, from Conrail at Vandalia, from Norfolk and Western Railway Company at Ramsey, and from Conrail and Mo-Pac at Pana. In addition, numerous motor common carriers serve the communities involved.

We adopt the conclusions of the Commission's Energy and Environment Branch that abandonment will not have a significant impact on the local environment or conservation of energy resources. Because the right-of-way was found suitable for alternative public use, we will require ICG to keep it intact for 120 days from the date of service, in accordance with 49 U.S.C. § 10906.

We find that the present and future public convenience and necessity permit the proposed abandonment subject to conditions for the protection of employees developed in *Oregon Short Line R. Co. - Abandonment - Goshen,* 360 I.C.C. 91 (1979) and the public-use condition.

It is ordered:

1. Our findings are being published in the *Federal Register* concurrently with the service of this decision. Offers by any person or governmental entity for financial assistance to enable continuance of rail service must be made within 10 days after publication of this notice. The offer must be filed concurrently with the Commission and comply with the requirements of 49 C.F.R. § 1121.38(c) and 49 U.S.C. § 10905, as amended by section 402(c) of the Staggers Rail Act of 1980.

2. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP."

3. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. The railroad shall not effect abandonment prior to the effective date of the certificate of abandonment.

4. This decision shall be effective 30 days from the date of service.

By the Commission, Review Board Number 1, Members Parker, Chandler, and Fortier (Board Member Fortier not participating).

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION DECISION

SERVICE DATE
Aug. 28 1981

Docket No. AB-43 (Sub-No. 66)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT FROM MP. 661.87 NEAR BRANCH JUNCTION TO MP. 728.00 NEAR ASSUMPTION IL IN CHRISTIAN, FAYETTE, MARION, AND SHELBY COUNTIES, IL

Decided: August 27, 1981

By decision of July 30, 1981, Review Board Number 1 approved this application for authority to abandon 66.13 miles of rail line in Christian, Fayette, Marion and Shelby Counties, IL.

On August 17, 1981, certain protestants[1] jointly filed a "limited" appeal. Specifically, they object to the Board's refusal to impose a condition requiring that a 2-mile segment be sold to Consolidated Rail Corporation (Conrail) before abandonment occurs.

On August 18, 1981, other protestants[2] filed a joint appeal alleging the improper exclusion of bridge traffic

[1]Christian County Farmers Supply Company, Fayette Service Company and Growmark, Inc.

[2]United Transportation Union, People of the State of Illinois, and the Illinois Commerce Commission.

data and errors in the consideration of wage, maintenance, and opportunity cost evidence. These protestants further, argue that the Board erred in accepting applicant's rebuttal statement into the record and in finding that abandonment would not have a serious adverse effect on rural and community development.

With respect to matters raised in the limited appeal, we believe the Board correctly determined that abandonment should not be conditioned (1) on the prior purchase of the 2-mile segment by Conrail as we have no authority to compel Conrail to purchase this trackage, or (2) on continued service by the applicant until some indefinite future time when Conrail or some other entity might assume service.

With regard to the latter appeal, we believe that the Board's analysis of the cost evidence was correct in all material respects, that its finding regarding impact on local communities was supported by the evidence, and that its acceptance of applicant's rebuttal statement into evidence was not an abuse of discretion.

It is ordered:

1. The appeals will not be heard.

2. The abandonment certificate will be issued on August 28, 1981.

3. This decision shall be effective on the date served.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISISON DECISION

SERVICE DATE
Oct. 2 1981

Docket No. AB-43 (Sub-No. 66F)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 661.87 AND 720.00 NEAR BRANCH JUNCTION AND ASSUMPTION IN CHRISTIAN, FAYETTE, MARION, AND SHELBY COUNTIES, FL

Decided: September 28, 1981

On September 21, 1981, Petrol Refining Company, Inc., filed a petition seeking to stay the effective date of the certificate and decision pending the completion of judicial review. The certificate and decision was served August 31, 1981, and is to take effect September 30, 1981. Another petition for stay pending judicial review was also jointly filed on September 21, 1981 by People of the State of Illinois, Illinois Commerce Commission, City of Vandalia, new Green Soil Service, Inc., Harbach, Nixon and Willson Inc., and Patrick W. Simmons (Illinois Legislative Director for United Transportation Union).

A review of petitioners' arguments leads me to conclude that they have not presented justification for a stay in conformity with the criteria for granting stay requests delineated in *Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

First of all, I do not find that petitioners have presented a substantial case and are, therefore, likely to prevail before the court. In its decision, served July 30, 1981,

Review Board Number 1 noted that applicant had estimated the cost for rehabilitating the line at $897,040, and the cost for annual maintenance after rehabilitation at $318,833. Moreover, even if applicant were legally precluded from selling the right-of-way, the Review Board nevertheless found that applicant would incur opportunity costs of $200,000 a year by having assets in addition to this right-of-way committed to the subject line. Based on these considerations, but accepting only for the purposes of argument that the holding in *City of Cherokee* v. *I.C.C.*, 641 F.2d 1220 (8th Cir. 1981) might require exclusion from the computation of avoidable costs the wages of trainmen and firemen, the decision to grant the abandonment application is supported by substantial evidence of a burdensome line. Accordingly, petitioners appear to have little chance of success on judicial review.

Petitioners also allege that they would be irreparably harmed by a termination of operations. While the Review Board did note that shippers would incur some financial losses and inconvenience from the abandonment, it also noted the availability of alternative transportation in the area, which is presently being used. Consequently, it cannot be concluded that petitioners would incur irreparable harm if the stay is denied.

On the other side of the balance, the applicant will in all probability incur substantial avoidable losses from continued operations over the line. Although a marginal profit was earned on the line for the first 9 months of 1980, the Review Board found that the line would have had substantial losses if normal maintenance had been performed in those months. It is questionable, however, whether applicant can continue an indefinite deferral of normal maintenance during the pendency of judicial review. It should also be noted that granting the stay

would cause the applicant to continue to incur opportunity costs amounting to at least $200,000 a year.

Finally, petitioners argue that a stay should be granted because abandonment is normally an irreversible action. Nevertheless, service could be restored, even where the rail has been removed. Applicant conceivably could be required, albeit at considerable expense, to replace its trackage if the decision authorizing abandonment were reversed.

In conclusion, I find that it would be contrary to the public interest to require the applicant to continue operations over the line until judicial review is completed.[1]

It is ordered:

1. The petitions for stay are denied.

2. This decision shall become effective on the date it is served.

By the Commission, Reese H. Taylor, Jr., Chairman.

JAMES E. BAYNE
ACTING SECRETARY

(SEAL)

[1]People of the State of Illinois, et al. filed a supplement to its petition for stay indicating that the applicant has elected to exercise presently only a portion of the abandonment authority. Since the Commission's approval is permissive, the applicant may exercise its abandonment authority to the extent its management deems necessary.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1299

In the Supreme Court of the United States

OCTOBER TERM, 1981

ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1299

ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in denying an application for an interlocutory injunction pending appeal of an Interstate Commerce Commission decision authorizing a rail line abandonment.

1. Illinois Central Gulf Railroad Company (ICG) filed an application with the Interstate Commerce Commission for authority to abandon approximately 66 miles of rail line in Illinois. The Commission issued a decision (Pet. App. 6a-18a) granting the application on the grounds, *inter alia*, that ICG had lost large sums of money operating the line (Pet. App. 8a-9a, 16a), that rehabilitation to restore the track to minimum safety standards would cost nearly $900,000 (Pet. App. 9a-10a, 16a), and that shippers would incur only minimal harm as a result of abandonment (Pet. App. 13a-15a, 16a). The Commission declined to hear

administrative appeals from that decision (Pet. App. 19a-20a), and petitioners sought review in the court of appeals.

Petitioners sought from the Commission a stay of abandonment pending judicial review, and the agency denied that request (Pet. App. 21a-23a). The court of appeals likewise denied petitioners' application for stay, on ICG counsel's representation that the railroad would preserve the roadbed and track in place pending review by that court (Pet. App. 3a-5a). The court of appeals also denied petitioners' subsequent request for an interlocutory injunction, noting again that the roadbed and track would be preserved pending review (Pet. App. 1a-2a).

Mr. Justice Stevens denied petitioners' application for a stay of abandonment pending the filing of the instant petition for a writ of certiorari.[1] ICG discontinued operations effective November 29, 1981.

2. Petitioners do not contend that, under the circumstances of this case, the court of appeals abused its discretion by denying their application for an interlocutory injunction. Rather, petitioners' primary argument (Pet. 8-11) is that even when, as here, the railroad agreed to preserve the track structure pending appeal, permitting the abandonment to occur precludes effective judicial review. That position, which is unsupported by authority, is without merit.

Whether to stay agency action is a matter of informed discretion. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10-11 (1942). Petitioners, however, do not attempt to show that *in this case* the consequences of an abandonment pending judicial review are so severe as to render the denial of stay an abuse of discretion. Instead, petitioners assert

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[1]No. A-464 (Dec. 1, 1981).

(Pet. 11) that permitting abandonment pending appeal precludes judicial review, and ground that argument solely on generalties.[2] In staying the decision of an administrative agency, however, a court must take into account such factors as the probability of success on the merits and the likelihood of irreparable harm (*Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1305 (1976) (Rehnquist, J., in chambers); *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958)), matters determinable on the facts of the particular case.[3] Irreparable injury, for instance,

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[2]Petitioners first contend (Pet. 9) that a rail abandonment "normally" is an irreversible action, implying that a discontinuance of operations pending judicial review, even when track structures are preserved, likewise is irreversible. Petitioners do not argue, however, that ICG could not restore service on the line involved here if the court of appeals were to remand the Commission's decision and the agency were to reverse the grant of abandonment. Moreover, even assuming that the discontinuance of operations here were irreversible, petitioners have not demonstrated injury from that action. The Commission found that no irreparable harm would result from a discontinuance of service pending judicial review, pointing out that shippers have available, and are currently using, alternative transportation services (Pet. App. 22a).

Petitioners also assert (Pet. 9-10) that denial of a stay pending appeal in an abandonment case means that review will not progress to conclusion. But a stay is not always a necessary incentive to prosecute appeals of Commission decisions authorizing abandonment. For example, in this case, petitioners acknowledge (Pet. 10) having filed their opening brief in the court of appeals.

Finally, petitioners suggest (Pet. 10) that they are entitled to a stay because they lack a civil damages remedy if they ultimately succeed in their appeal, and because the right-of-way may revert even if the track structure is preserved. Concerning damages, petitioners do not show how the instant discontinuance of service pending review will cause them harm, compensable or otherwise. Concerning the possibility of a reverter, although that factor might be important in a particular case, petitioners do not demonstrate how reverter might operate here to preclude a restoration of service.

[3]Petitioners state (Pet. 9) that, because of adverse effects on shippers and communities, an abandonment should be subject to immediate injunctive relief, citing *ICC* v. *Maine Central R. R.*, 505 F. 2d 590 (2d

ordinarily will not be inferred but must be demonstrated on the record.[4] See *Sampson* v. *Murray*, 415 U.S. 61, 88-89 (1974).

In essence, petitioners argue for an inflexible rule that would require the court of appeals automatically to issue a stay each time a party seeks review of a Commission decision authorizing abandonment. Such a rigid requirement would be plainly inconsistent with the rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968).[5]

Cir. 1974), and *ICC* v. *Chicago, R.I. & P. R.R.*, 501 F. 2d 908 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975). Those cases are inapposite. Each involved a Commission request to a district court for an injunction compelling a railroad to restore service discontinued without prior agency authorization. Moreover, both decisions recognized that the circumstances of the particular case were critical in determining whether injunctive relief would be available (*Maine, supra*, 505 F. 2d at 594-595; *Chicago, supra*, 501 F. 2d at 914-915), and that even when such relief is available, the issuance of an injunction is a matter within the sound discretion of the district court (*Maine, supra*, 505 F. 2d at 595; *Chicago, supra*, 501 F. 2d at 914-917).

[4]Contrary to petitioners' suggestion (Pet. 10-11), *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372 (1967), does not support their position that abandonment pending appeal terminates judicial review. In that case, the Court reversed the denial of an interlocutory injunction of a large railroad merger. The Court held that, before permitting consummation of the merger, the Commission was required to conclude proceedings concerning certain railroads that would be adversely affected by the transaction. The Court's decision was based upon the Commission's own findings that the merger would be consistent with the public interest only if conditions to protect the affected railroads were first imposed. 386 U.S. at 378, 388-392. Unlike the Commission decision in that complex merger case, the agency determination in this simple abandonment does not depend for its validity upon the favorable disposition of subsequent proceedings.

[5]In *Permian Basin*, the Court held that the Federal Power Commission was not required automatically to issue a stay of an area rate order pending disposition of petitions for special relief. Finding no reason to believe that it would in all cases be an abuse of discretion for the agency

Moreover, the issuance of a stay is not a matter of right even if irreparable injury might otherwise result, but is a matter of judicial discretion dependent on the circumstances of the particular case. *Scripps-Howard, supra*, 316 U.S. at 10-11. Petitioners' position is inconsistent with the broad judicial discretion that lies at the heart of all equitable relief. *Permian Basin, supra*, 390 U.S. at 773-774.

3. Petitioners also argue (Pet. 11-12) that, in denying their application for an interlocutory injunction, the court of appeals should have made findings on each of the traditional prerequisites for a stay. That contention is inconsistent with petitioners' failure to demonstrate the pertinence of those factors to this case, and is otherwise without merit. There is no fixed requirement that a court of appeals recite that it has taken the traditional criteria into consideration, or explain its reason for taking the action that it took. *Coleman* v. *Paccar Inc., supra*, 424 U.S. at 1305. Only if a court of appeals *grants* a temporary stay does the governing statute, 28 U.S.C. 2349(b), require "a specific finding * * * that irreparable damage would result * * *." The *denial* of an application for a stay is subject to no similar requirement.[6]

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to deny a stay, and noting that in many situations a stay might be inappropriate, the Court declined to impose any such inflexible obligation. 390 U.S. at 773-774.

[6]Petitioners' reliance on *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940), is misplaced. In that case, the Court reversed an interlocutory injunction issued by a district court. The Court noted the explicit requirement in Fed. R. Civ. P. 52(a) that, in granting or refusing an interlocutory injunction, a district court shall set forth findings of fact and conclusions of law. The rule applicable to the courts of appeals, on the other hand, Fed. R. App. P. 18, imposes no comparable requirement.

Nor does *Sampson* v. *Murray*, 415 U.S. 61 (1974), lend any support to petitioners. In that case, the Court reversed a decision affirming the grant of a temporary restraining order. The Court determined that

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

DANIEL B. HARRELL
Attorney
Interstate Commerce Commission

FEBRUARY 1982

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under the governing standards the issuance of a temporary injunction was improper, and that the court of appeals erred in suggesting that the district court need not find actual irreparable injury in granting such relief. That case does not indicate that a court of appeals must provide reasons supporting a denial of injunctive relief—particularly in a case such as this, in which petitioners have made no showing suggesting that the traditional prerequisites for such extraordinary relief are satisfied.

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